BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Local Competition Provisions in The Telecommunications Act of 1996	)	**CC Docket No. 96-98**

INITIAL COMMENTS OF

COMMENTS OF:

THE STATE OF MAINE PUBLIC UTILITIES COMMISSION,
THE STATE OF MONTANA PUBLIC SERVICE COMMISSION,
THE STATE OF NEBRASKA PUBLIC SERVICE COMMISSION,
THE STATE OF NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION,
THE STATE OF NEW MEXICO STATE CORPORATION COMMISSION,
THE STATE OF UTAH PUBLIC SERVICE COMMISSION AND DIVISION OF PUBLIC UTILITIES
THE STATE OF VERMONT DEPARTMENT OF PUBLIC SERVICE AND PUBLIC SERVICE BOARD, AND
THE PUBLIC UTILITIES COMMISSION OF SOUTH DAKOTA

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SUMMARY

The Commenting States concur with the New York Public Service Commission's comments relating to the legal principles regarding the FCC's jurisdiction over interconnection and concur with all of the National Association of Regulatory Utility Commissioners (NARUC) comments. NARUC provides comments supporting the need for state flexibility. Our comments provide a factual basis with specific state examples for those more general arguments. We also provide state specific examples to show that many of the small commenting states have been actively pursuing pro-competitive policies even though many of the states may not have adopted formal interconnection rules. Specifically, our comments address the following:

1. State specific examples of how national uniform prescriptive rules or policies will cause problems for rural states.

2. State specific examples of the kind of creative schemes that will enhance the Commission's pro-competitive goals that will be thwarted if the FCC is overly preemptive and prescriptive.

3. State specific examples of what we have been doing regarding implementing local competition both before and after the passage of the Telecommunications Act of 1996.

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COMMENTS

The Commenting States

The Commenting States are statutorily responsible for establishing just and reasonable rates, charges and practices for public utilities within their jurisdictions. They therefore are "State commission(s)" within the meaning of the Telecommunications Act of 1996.[1] (the Act) Pursuant to the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. §§ 1.49, 1.415, and 1.419 (1995), the eight Commenting States are Maine, Montana, New Hampshire, New Mexico, Utah, Vermont, Nebraska, and South Dakota. They hereby respectfully submit these comments addressing the "Notice of Proposed Rulemaking" ("*NPRM*") adopted in the above captioned proceeding April 19, 1996 [FCC 96-182].

The Commenting States fully concur and endorse the New York Public Service Commission's argument supporting its position regarding the legal interpretation of the interrelationship of sections 251, 252 and 152b set forth in its comments in the instant docket. The Commission's tentative conclusion that its role under section 251 of the Act supersedes state authority and takes precedence over sections 252

[1] *E.g.* 1996 Act, Sec. 101(a), §§ 251(e), 252(b).

and 152b is in error.

The Commenting States also fully support and endorse the comments made by the National Association of Regulatory Utility Commissioners.

State diversity must be recognized

We do not believe the Commission should or can dictate a national structure for pricing, including transport and termination of traffic. These rules are better left to the states. As mentioned in the NPRM, numerous states, eg., Pennsylvania, California, New York and Washington, have created fair and reasonable compensation arrangements within the states. The rules in these states vary which lends support for the determination that different situations and circumstances are experienced by the states and that a national "one-size-fits-all" approach will not be beneficial. Further, states should not be constrained by a national rule that negates the vast quantity of work that has already been completed in an effort to foster competition.

As discussed in New York's comments, we do not believe that the Commission should or can dictate pricing methodologies to the states, including generic pricing policies. Pricing issues are extremely complex, as LECs have different cost structures in different regions. Therefore, pricing policies established by the FCC would not

only undermine state authority, but prove unworkable.[2]

Variations in embedded plant and network architecture will make broad nationwide rules unworkable. The state commissions are far more familiar with local variations and technical differences than the federal government. As a result, they will be in a much better position to arbitrate disputes that cannot be resolved between companies on a case-by-case basis.

Given the variations in terrain, population density and even customer demand, the rapid changes now occurring in technology cannot be deployed throughout the country at the same rate. The States must therefore have the flexibility to require unbundling that best reflects the situation each state faces rather than be bound by a rigid approach.

It is the position of the states, as expressed above, that, because of the different geographical and physical plant architectures between states, national standards and obligations will be unworkable. All LEC embedded networks have evolved over time and most of the outside plant configurations are not the same.

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[2]For example, the NHPUC has found with respect to NYNEX "that basic exchange services are not only recovering their incremental costs but also contributing towards common overhead costs." [see Re: New England Telephone and Telegraph Company, 76 NHPUC 150, 167 (1991)].

Mandated national standards might cause a significant capital expenditure to accommodate the FCC's requirements. Furthermore, the interconnecting party might not require nor even want the type of unbundling that the FCC may order.

Rural states have been moving forward to implement local competition

One of the reasons the FCC gives in support of adopting explicit rules is that "[s]uch rules also could expedite the transition to competition, particularly in those states that have not adopted rules allowing local competition. . . ." (¶ 28) The FCC goes on to state that "[m]ore than 30 states do not have rules governing local competition in place today; most of those states have not commenced proceedings to adopt the necessary rules." (¶ 5) These statements seem to imply that there are many state commissions not interested in competition. However, these statements fail to recognize that a state commission may not have developed specific rules governing local competition for a very valid reason: no one was interested in competing.

Over a year ago, the Maine Commission issued a pro-competitive proposal to provide for access charges to allow for interconnection by competitive local exchange carriers. However, potential local exchange competitors evidenced little interest in

that proposal and, prior to the passage of the Act no entity applied to provide competitive local service in Maine. It is not surprising that Maine had not chosen to open a rulemaking on local exchange competition on issues before the passage of the Act.

That decision, however, does not translate into a Maine State policy to retard competition or delay in addressing implementation of the Act. Indeed, shortly after passage, AT&T sent a formal request for authority to provide local service to all fifty states. Maine granted the request in less than six weeks.[3]

An approach Maine has been considering is an example of a state approach which would better achieve the pro-competitive aims of the Act than a national prescriptive approach (see paragraph 51 of the Notice). The Maine approach would provide incentives to bring competitive local service providers to the most rural areas of the State by providing competitive LECs with the amount of the subsidy in a rural area that is currently implicit in the incumbent's rates by virtue of company-wide rate averaging. This kind of creative scheme, which will enhance the Commission's and Congress's pro-competitive aims, will be thwarted if the FCC is overly preemptive

[3] See, Order, "AT&T Communications of New England, Inc. Request for Authority to Expand Certificate, to Permit, to Provide all forms of Local Exchange Service" Docket No. 96-105, (April 23, 1996).

and prescriptive.

Montana is one of the largest states in the nation, but with one of the smallest populations. There are enormous geographic, demographic and economic differences among various parts of Montana. There is “lots of dirt between phones.” Much of that dirt is the Rocky Mountains. To meet these conditions, the Commission works intensively with local communities and providers to improve both basic and advanced services.

There are twenty local exchange carriers in Montana. With the exception of U S West, all are classified as “rural” under Section 251(f)(1) and as “small” under Section 251(f)(2). To the extent robust local competition develops, especially facilities-based competition, it will most likely be between existing LECs. The Montana Commission requires sufficient flexibility to design rules for this situation. Mid-Rivers Telephone Cooperative, Inc. has already notified customers in one of US West's exchanges that it is planning to offer local phone service in that exchange in direct competition with US West as early as the fall of 1996.

As recently as several years ago, Montana was one of only twelve states which had no barriers to entry. However, due to sparse population, a lack of many major customers, and the high cost of providing local service, there was no effective

local competition. In a number of situations, competitive providers (including MFS) have been asked whether they intended to enter Montana. They said no.

Montana has pursued a competition-oriented agenda appropriate to its circumstances. It is now actively implementing the Telecommunications Act of 1996.

General Federal Communications Commission guidelines are appropriate. Extensive consultation and cooperation is valuable, and need not be mandated. Mandates are antithetical to cooperation. Prescriptive FCC policies will retard Montana's work developing a competitive regime tailored to its particular circumstances. The effect will be even worse if prescriptive FCC rules are litigated, causing delay and uncertainty. Montana needs a basic outline of federal policies and the freedom to responsibly develop a competition agenda within that outline.

Montana is moving aggressively to implement the Act. Within days of its passage, the Montana Public Service Commission opened Docket 96.2.16. The Commission convened a full-day roundtable of all interested parties. About 100 current and potential local phone service providers, consumers, advocates and legislators attended the meeting, held in the historic Montana House of Representatives Chamber. Subsequently, the Commission issued a notice outlining

possible actions and requesting comments on a series of issues. Twenty parties filed written comments. Reply comments are due on May 20. Based on those comments, the Commission is developing appropriate Montana policies in all areas.

Working closely with the Commission, a Governor's Blue Ribbon Task Force on Telecommunications is identifying customer needs, and considering issues such as universal service and access to advanced services. The Task Force, which includes strong legislative participation, will make recommendations to the next legislative session, specifically including any statutory amendments made appropriate by the Telecommunications Act.

The Montana Telecommunications Act (MTA), passed in 1985, is extremely pro-competitive. The MTA provides the Montana Commission with the regulatory framework to allow the transition to a fully competitive telecommunications market (pricing flexibility, alternative forms of regulation, forbearance, etc.).

Because of the lack of immediate interest by potential competitors and the extremely uncertain national environment as various federal bills were considered, the Montana Commission did not use its limited resources to promulgate interconnection rules. However, it has aggressively pursued competition in every situation where it might benefit Montana customers. Among proceedings in which competitive issues

have been extensively addressed are the following:

- **Docket No. 92.6.28.** On June 9, 1992, the Montana Commission opened an inquiry into Open Network Architecture. The intent of the docket was to consult with industry and others before proceeding with a formal rulemaking. The Commission requested and received comments on numerous issues regarding ONA, including costing and pricing, collocation, structural separation, availability and deployment. The docket was closed on September 6, 1994, when industry members reported issues were premature for consideration in Montana.

- **Price flexibility.** The Montana Commission has increasingly granted LECs significant pricing flexibility for various "competitive" services.

- **Forbearance.** The Montana Commission has granted carriers forbearance from regulation in numerous specific situations in which competition was apparent.

- **Independent evaluation of regulatory approaches.** The Commission hired economic consultant Joe Gillan to assist the Commission review and coordinate various elements of its telecommunications policy, including specific competition-oriented measures.

Utah has a total population of nearly 2 million people. Approximately two-thirds of that population is located along the eighty mile stretch known as the Wasatch Front. The remainder of the state is very rural. A major goal of the Utah PSC is to maintain affordable rates throughout the state. National policies that may appear to achieve anticipated results in the smaller but densely populated states could have devastating impacts in sparsely populated states such as Utah. The Utah PSC must have the flexibility to address specific problems including the apparent subsidy that flows from urban to rural customers in order to maintain affordable rates throughout the State. Otherwise, rural portions of this State may experience unacceptable rate increases or even loss of service, and never realize any benefits from competition.

Historically, the local exchange franchise granted to telecommunications providers was an exclusive franchise, which prohibited competitive local exchange companies from entering the Utah market.

In 1994 the PSC opened an investigation into competitive changes occurring in the state and what regulatory and statutory changes were needed to facilitate the beginning of competition. The Commission held numerous technical conferences and meetings throughout 1994. This process resulted in the passage of the

Telecommunications Reform Act by the Utah legislature during the 1995 session in February. This Act was signed into law by the Governor in May 1995.

The Telecommunications Reform Act enabled the PSC to certificate more than one carrier in the same geographic area and changed the way that incumbent telephone companies are regulated in Utah. The Act also established the rules for regulation and competition within the territories of Utah's small independent companies. (U S West Communications is Utah's only Tier 1 telecommunications provider).

Following the enactment of the Telecommunications Reform Act, the PSC granted certificates to two companies to provide local exchange service in Utah. Electric Lightwave, Inc., and Phoenix Fiberlink, Inc. were both granted operating authority in 1995. Subsequently, Nextlink of Utah, LLC, and AT&T requested and were granted local exchange authority. At this time, requests for certificates are pending from TCG Utah and Winstar Wireless of Utah.

Soon after the granting of certificates to the first three companies to request authority, the PSC began proceedings to establish rules for interconnection. After significant investigation which included numerous technical conferences, meetings, and presentations including all interested parties, the Utah PSC scheduled hearings

intended to result in rulemaking to begin in January 1996. Federal action, which resulted in the passage of Telecommunications Act of 1996 caused the Commission to delay hearings until May 1996. These hearings began on May 6 and are scheduled to conclude by May 21, 1996. At the end of this process the Utah PSC will issue interconnection rules for this state.

In South Dakota, the Legislature rewrote the telecommunications statutes in 1988 to allow for and to promote competition. South Dakota law allows a competitor to compete in U S West territory. See SDCL 49-31-21. The standard for allowing competition is that the South Dakota Public Utilities Commission (SDPUC) must find it is in the public interest and will further competition. Despite this statute, no company requested to compete in U S West territory from 1988 to 1995. It made little sense for the SDPUC to develop specific rules to govern local competition when no entity expressed an interest in providing local competition.

In addition, South Dakota law allows for services to be classified as fully competitive. The SDPUC has classified many services as fully competitive including private line and special access. The SDPUC has the authority to reclassify any service as fully competitive pursuant to the statutory standards. See SDCL 49-31-3.2 to 49-31-3.4, inclusive.

Further, in 1995, the SDPUC opened a Notice of Inquiry entitled In The Matter Of The Development Of An Improved Industry Environment Which Better Fosters Competition and Enhanced Services Within the Telecommunications Industry. The SDPUC's Notice of Inquiry, sent to providers as well as consumers, requested comments that would assist the SDPUC in developing a plan to improve its state's telecommunications system. This Notice of inquiry demonstrates the SDPUC's interest in developing and promoting competition that will meet the specific needs of South Dakota consumers.

Currently the SDPUC has a number of open dockets that relate to the Act. To date, three companies have requested certificates of authority to provide local exchange services in competition with our existing local exchange companies. The SDPUC also has two dockets concerning requests from interexchange carriers for all existing interconnection agreements between local exchange carriers. In addition, the SDPUC also has just recently opened a docket seeking comments from interested persons or entities on the process the Commission will use in dealing with requests for mediation or arbitration pursuant to section 252.

The New Hampshire General Court acted in 1995 to open the local telecommunications market to competition. Effective July 23, 1995, the New Hampshire General Court (the Legislature) amended RSA 374:22 to permit open

competition within the Regional Bell Operating Company's territory[4] (Laws of 1995, Chapter 147). The amendment, RSA 374:22(g) reads:

> I. Notwithstanding any other provision of law to the contrary, all telephone franchise areas served by a telephone utility that provides local exchange service and that has more than 25,000 access lines, subject to the jurisdiction of the commission, shall be nonexclusive. The commission upon petition or its own motion, shall have the authority to authorize the providing of telecommunications services, including local exchange services, and any other telecommunications services, by more than one provider, in any service territory, when the commission finds and determines that it is consistent with the public good.

The Legislature's express purpose in enacting RSA 374:22-g was "to foster the growth of competition in local telecommunications markets." The Legislature directed the New Hampshire Public Utilities Commission (NHPUC) to adopt rules enforcing the provisions of this section by no later than December 31, 1996.

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[4] Consistent with the 1996 Act, 22(g) applies to the RBOC franchise while RSA 374:22(f), which appears to be preempted by the 1996 Act's provisions regarding rural telephone companies, preserved the exclusivity of the independent local exchange company franchises.

The NHPUC is drafting proposed rules for consideration by the Legislature, after considering other states' proposed rules and the multiplicity of interests involved. The draft includes, inter alia, definitions, procedures for certification, enumerations of the services considered to be Basic Service, reporting requirements, number portability requirements, identification of network elements required to be unbundled, interconnection points, and affirmative obligations of cooperation between carriers. The draft is consistent with the 1996 Act and is crafted with the particularities of New Hampshire in mind.

In New Mexico, the New Mexico Telecommunications Act has provided for local competition since 1985 if said competition was determined to be in the public interest. Despite the existence of this statute, no requests to compete in the local exchange market were ever received prior to the passage of the Act. In fact, the first application to provide switched local service was received on February 27, 1996. As a result, It was not in the State Corporation Commission's interest to expend the considerable resources necessary to develop specific rules when there was absolutely no interest expressed in providing switched local services.

Since the passage of the Act, the New Mexico State Corporation Commission (“NMSCC.”), has been working feverishly to open New Mexico's telecommunications markets to competition.

On April 22, 1996, the NMSCC, issued orders in three dockets establishing new registration requirements for non-facilities based resellers of intrastate long distance telecommunications services, operator services providers, competitive access providers and local exchange companies. These orders were issued in order to carry out the mandates of the Act.

In Docket No. 96-142-TC, the NMSCC adopted guidelines providing for a streamlined registration process for new applicants seeking authority to provide local exchange services. Applicants are required to furnish evidence of financial and technical competency, as well as information regarding future interconnection with incumbent local exchange companies, arrangements for providing 911 services, etc. Once the NMSCC Staff verifies that the applicant has provided sufficient information regarding its proposed services and has demonstrated its financial and technical competency to provide these services, a certificate of registration is issued to the applicant and the applicant becomes a duly-certificated local exchange carrier within New Mexico.

However, a newly-registered local exchange carrier, even though it holds a certificate of registration, does not possess immediate authority to operate in New Mexico. Such operating authority is subject to the applicant showing at hearing that

it meets minimum standards of service quality, that such authority is in the public interest, and that universal service considerations will be met. The registration process is designed to expedite the certification of financially and technically sound entities so that the aforementioned hearing can focus on a limited number of clearly-defined issues, resulting in a more timely disposition thereof.

Vermont opened the intraLATA toll market to competitive entry in 1986, one of the earlier states to authorize such competition[5]. Since that time, the intraLATA toll market has seen a significant growth, with NYNEX's share of the business toll market reduced to about 60%. Additionally, Vermont determined that service territories for telecommunications providers within the State were not exclusive, thus eliminating barriers to entry by new local service providers.

To date, Vermont has received few requests from companies seeking to provide competitive telecommunications services (other than those offering solely intraLATA toll services), but it has granted all such requests. The first provider, Hyperion Communications, requested and received authorization in 1994 to offer services (primarily competitive access services) within the state of Vermont. The State also granted a similar request from !nterprise in 1995. Until passage of the Act, no company sought authorization to compete for local exchange service.

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[5] Re Burlington Telephone Company, Docket 4946 (Feb.21, 1986).

The Public Service Board has initiated (as of 1995) a generic investigation into competitive issues. This investigation is a comprehensive review of telecommunications competition, examining a wide range of competitive issues, including resale, unbundling, pricing for unbundled elements, presubscription, interconnection, and public service obligations. The Hearing Officer in that proceeding has issued a Proposed Decision in the first Phase of the docket that establishes the following:

- Unbundling - The Proposal is based upon six categories of functionality, similar to the four set out by the FCC. These include the link, local switching, transport, tandem switching, signalling, and ancillary services.

- Pricing rules for unbundled elements - While not adopting specific prices, the Proposal recommends a methodology similar to that proposed by the FCC, with wholesale pricing based upon Total Service Long Run Incremental Cost ("TSLRIC") with a markup to reflect joint and common and historic costs, as appropriate. Specific prices will be set in the second Phase of the proceeding.

- Imputation to avoid cross-subsidization and price squeezes.

- Cost studies for incumbent LECs to determine the TSLRIC and establish

a basis for setting prices.

The Proposal for Decision is not a final Order, although it is expected that the Board will issue its decision before the end of May. Parties are already negotiating specific solutions consistent with the Proposal for Decision in the first Phase and are expected to have a partial settlement by the end of this month.

On June 23, 1995, In Case No. 94-1102-T-Gi, the Public Service Commission of West Virginia directed that a Task Force of interested parties chaired by the Staff, examine and report on a list of 44 issues relating to local exchange competition and to submit a draft of proposed rules. The Task force first met in August 1995, and grouped the Commission prescribed issues into six distinct categories for future sessions. Specifically, these categories were Universal Service; Regulatory Controls; Competitive Safeguards; Access, Interconnection and Resale; Numbering/Dialing; and Implementation. Following these sessions, the Task force issued its report on May 8, 1996.

Uniform prescriptive rules or policies will cause problems for rural states

In paragraph 33 of the NPRM the Commission states that the case for permitting material variability among the states could be strengthened if there are

substantial state specific technological, geographic or demographic variations in local markets. They go on to invite the states to comment regarding the nature of these variations and whether the variations require different regulatory approaches.

The wide range of costs for links, ports, switching and transport in rural states like Maine may be one such case. While the use of average TSLRIC pricing for these network components may be appropriate to an urban state or market area with somewhat homogeneous cost characteristics an average prescriptive policy could have devastating "cream skimming" or "cherry picking" implications in states like Maine where the monthly cost of a loop may vary from under $5.00 to over $200 a month and where switching and transport costs could vary between areas by factors as great as ten to one.

The Montana Commission is also engaged in extensive information sharing with other states, especially the other thirteen U S West states via the Regional Oversight Committee. Direct state-to-state cooperation, as opposed to top-down federal mandates, allows states to share their work, develop regionally-appropriate approaches to multi-state companies, and craft state-specific solutions. Based on this work, the Montana Commission has extensive familiarity with the range of approaches to all issues and the ability to expeditiously develop Montana-appropriate policies.

Vermont is a rural, high cost state. Based upon analyses performed during the FCC's investigation into the High Cost Fund, Vermont has among the highest loop and switching costs of any state. These costs lead to higher, less affordable rates than exist in many other states. This fact makes Vermont much more susceptible to threats to affordability and universal service if basic rates rise due to the application of pricing rules for competitive services.

The Vermont Public Service Board recently examined the appropriate pricing of unbundled services in the context of its generic competition investigation. The Hearing Officers, while adopting TSLRIC as the appropriate methodology for basing prices, concluded that "it would be inappropriate to restrict the pricing of essential facilities to no more than TSLRIC.[6] The Board has not yet issued its final decision on this matter. The Hearing Officer concluded that factors such as recovery of contribution from essential facilities and the LECs' abilities to recover all joint and common costs for non-essential and competitive services dictated against adopting a strict TSLRIC pricing floor. The adoption of a strict TSLRIC standard by the FCC could undermine this careful balancing. Faced with having to recover all of its costs above TSLRIC from retail services, and retaining a legal opportunity to earn a fair return on their investment, incumbent LECs will likely resort to increase dial tone

[6]Investigation into Open Network Architecture, Docket No. 5713, Proposal for Decision at 41.

rates. Needless to say, for rural, high cost states that already have high rates, affordability (which is mandated by both federal and state law) will be imperiled. This could, in turn, require much higher distributions from the federal Universal Service Fund to meet the section 254(b)(3) goal of reasonably comparable rates. To avoid these outcomes, states such as Vermont need flexibility to establish reasonable cost-based prices for unbundled elements.